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Supreme Court, U.S.
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No. 95-38

In The

Supreme Court of the United States

October Term, 1995

GLADYS MURRAY, On Behalf of Herself and All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

v.

STUCKEY'S, INC., AND PET INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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Reply Brief for Petitioners

I

Respondents Concede that the Three-judge Panel Substituted Its Judgment of the Facts for That of the Trial Court

Respondents concede in their brief (p. 7) that " . . . what the *duties* and *responsibilities* of the store managers were and how they spent their working time were clearly questions of fact." (emphasis supplied)

Again, at page 11 of their brief, Respondents state that: "The Respondents readily *concede* that questions of fact are involved in determining the particular *activities* and *duties* of store managers, i.e., how they spent their working time." (emphasis supplied)

On the subjects of *duties, responsibilities,* and *activities* the trial court made findings of fact that:

> 1) The *duties* of the claimed exempt and admittedly non-exempt employees were essentially the same. (1989 Order, Finding of Fact 17, p. 86a).
>
> 2) The Plaintiffs spent 65 to 90% of their time on non-managerial *duties.* (p. 68a).
>
> 3) The Defendants have failed in their burden of proof that the employees were exempt from the overtime provisions of the Act (Finding of Fact 29, p. 96a).
>
> 4) Defendants have failed in their burden of proof that the primary *duty* of Plaintiffs was management (Finding of Fact 28, p. 95a).
>
> 5) Defendants failed in their burden of proof that Plaintiffs were in *"sole charge"* of their stores (Finding of Fact, 29, p. 96a).

> 6) Defendants had not met their burden of proof that Plaintiffs *customarily* and *regularly* directed the work two or more employees (p. 34a).
>
> 7) Defendants have not met their burden of proof that Plaintiffs *customarily* and *regularly* exercised discretionary power. (p. 38a). (Emphasis supplied)

The three-judge panel left standing the first of those findings of fact. The three-judge panel acknowledged that the second of those findings of fact was not clearly erroneous and so it also stands.

The three-judge panel then set aside the remaining five findings of fact. It did so in spite of the fact that the first two of those findings of fact have not been disturbed. It seems clear the trial court drew inferences from the first two findings in making the five findings of fact for which the three-judge panel substituted its judgment.

All seven of those findings of fact deal with *duties, responsibilities* and *activities* of the employees. The questions of "customarily and regularly" which are involved in the last two of those findings are questions of "frequency" and are clearly questions of fact.

Since all of these questions are conceded by Respondents to be questions of fact, it is clear that *Murray I* and *Murray II* conflict with decisions of other Circuits, and depart from the accepted and normal course of Judicial proceedings. Therefore, the Writ of Certiorari should be granted and the case summarily reversed as prayed at page 28 of the Petition.

II

Respondents Mistakenly Pretend that this Case was Based on "Undisputed Facts"

Respondents refer at page 3, at page 9, and again at page 11 to the "undisputed facts"[1] of this case and suggest that this case was tried with only three Petitioners' witnesses and a huge volume of documents.

But that is not true. There was a four-day bench trial in which Petitioners presented 59 witnesses (three live and the rest by deposition). Those witnesses presented by Petitioners by deposition included a Senior Vice-President, a regional manager, and at least two former regional managers of the Respondents. Respondents presented eight live witnesses, but listed 19 live witnesses in the Final Pre-trial Order.

Certainly, the three-judge panel did not agree in *Murray I* that the case was tried on "undisputed facts." It remanded for findings of fact for two factual issues. The panel noted that one of the issues was "a contested issue at trial" (page 73a) and that discretion of the "managers" was circumscribed or limited. And certainly, the inferences to be drawn from the facts presented were highly contested and disputed. The questions of "customarily and regularly" were highly disputed.[2]

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[1] The only undisputed facts in this case involved deductions from salary for sickness. That testimony was discussed in footnote 3 of the Petition and will not be repeated here. That testimony supports judgment for the Petitioners but was ignored by both the trial court and the panel.

[2] Respondents begin their brief on page 1 by noting that the Petitioners alleged that they worked 24 hours per day. Respondents omit the fact that this claim was for compensation for interrupted sleep time under 29 C.F.R. § 785.22(b). The trial

III

Credibility was a most Significant Issue in this Case

Respondents assert at page five of their brief, and again at page thirteen that credibility issues were not present in this case because Petitioners presented only three live witnesses at trial with the remainder of the Petitioners testifying by deposition.

But it was not the credibility of Petitioners' witnesses that was at issue at trial. At issue was the credibility of the Respondents and their witnesses. Respondents induced employees to falsify records, while Respondents themselves falsified answers to interrogatories and had the burden of proof on the executive exemption. They presented eight live witnesses at trial and it is their credibility that was at issue in this case, *not* the credibility of the Petitioners.

IV

Respondents Misread or Misinterpret Controlling Decisions of this Court.

At page four of their Brief, Respondents assert that the decisions of the three-judge panel are " . . . entirely consistent with . . . *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986)." Respondents then go on to say that "The Ninth Circuit engaged in an independent *de novo* review of the facts as found by the trial court . . . "

---

court held that Petitioners failed to carry their burden of proof on this issue (pages 117a-119a). Respondents had the burden of proof on the issues presented to the Court of Appeals. Respondents should accept the trial court's findings of fact as Petitioners have done.

That is not true. The Ninth Circuit said in its review of *Icicle* that ". . . we can review the question in this instance as one of law." *Worthington v. Icicle Seafoods, Inc.*, 774 F.2d 349, 353 (9th Cir. 1984). That is not an independent *de novo* review of facts.

In an opinion written by Justice Rehnquist, this Court disagreed. Justice Rehnquist said the Ninth Circuit had engaged in fact finding, noting that

> "The question of how the respondents spent their working time aboard the *White Star* is a question of fact." 475 U.S. at 714

So we see that the Ninth Circuit in *Icicle*, like the Eighth Circuit here, engaged in fact finding under the guise of deciding questions of law. There is no procedural difference between *Icicle* and this case. The only difference between *Icicle* and this case, though perhaps irrelevant, is that in the *Icicle* trial court, the employer prevailed on the facts. In this case, the employees prevailed on the facts in the trial court.

V

The Eighth Circuit did in Fact Substitute Its Judgment of the Facts for That of the Trial Court.

Notwithstanding the concessions by Respondents pointed out in Division I of this Brief, Respondents include in their Brief a Division II at page 8. In that Division they contend that the Eighth Circuit did not engage in fact finding or substitute its judgment for that of the trial court. But the Petition itself (amplified by Respondents' concessions) demonstrates that the panel did engage in fact finding and substitute its judgment of the facts for that of the trial court.

The Respondents in Division II discuss *two* of the *five* findings of fact that were set aside. They do not address at all *three* of the *five* findings of fact which were set aside by the panel, although the other three findings were individually addressed in the Petition. Respondents do not disagree with Petitioners' contention that if the panel erred in setting aside any *one* of the *five* findings of fact the opinions of the panel must be set aside.

Petitioners' position as to the three findings of fact set aside in *Murray I* has been addressed in the Petition and will not be further addressed here.

As to the issue of "Supervising Two or more Employees", the trial court findings were in part based on credibility, as pointed out in the Petition and as further demonstrated in Division III of this Brief.

On the issue of "Exercising Discretionary Powers" Respondents completely ignore the requirement that such powers be *"customarily and regularly"* exercised. That was the fighting issue on remand. Petitioners have never contended that they did not *on occasion* exercise *some* discretionary powers. But Petitioners have always contended that the exercise of discretion was neither *customary* nor *regular*. This created a factual issue which was decided by the trial court in favor of Petitioners. The panel substituted its judgment of those facts for that of the trial court.

VI

The Opinions of the Panel Conflict with Decisions of other Courts

The Respondents assert at page 3 of their Brief "Petitioners' contentions that the Eighth Circuit's decision . . . conflicts with recent decisions of three other Circuit Courts of Appeal, are without support."

Then, in the Conclusion of the Brief at page 17 the Respondents again assert that "the Eighth Circuit rulings are not in conflict with the decisions of this Court . . . *nor are they in conflict with other circuits* which have interpreted the burden of proof in FLSA exemption cases." (emphasis supplied)

Except for these two conclusionary statements, Respondents do not deal with this issue which was presented and discussed beginning at page 22 of the Petition. That material need not be repeated herein.

However, Petitioners do point out that the concessions as to the factual nature of the issues relating to *duties, responsibilities,* and *activities* pointed out in Division I of this Brief, make it abundantly clear that the opinion of the three-judge panel conflicts with the opinions of three other Circuits. *Dahlheim v. KDFW-TV,* 918 F.2d 1220 (5th Cir. 1990); *Brock v. Mr. W. Fireworks Inc.,* 814 F.2d 1042 (5th Cir. 1987), *cert. denied,* 484 U.S. 924 (1987); *Martin v. Cooper Electric Supply Co.,* 940 F.2d 896 (3rd Cir. 1991) and *Brock v. Norman's Country Market, Inc.,* 835 F.2d 823 (11th Cir. 1988), *cert. denied,* 487 U.S. 1205 (1988).

Two of these cases, *Dahlheim* and *Norman's Country Market,* dealt with setting aside findings of fact as to "primary duty" as does this case (See Division C of the Petition beginning at page 22.) There is clearly a conflict among the Circuits.

VII

The Eighth Circuit has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to call for an Exercise of this Court's Power of Supervision.

At page 16 of their Brief, Respondents assert that "the sole basis for it (Question Presented for Review No.

3) is the representation that Petitioners have found no other Court of Appeals decisions which overturned findings in favor of employees on the executive employee exemption."

But that is not what Petitioners said. Because Petitioners' language has been misquoted, Petitioners call attention to the last paragraph of page 26 and the first paragraph of page 27 of the Petition.

Reading of these two paragraphs will make it clear that there are no other reported cases where a Court of Appeals has overturned findings of fact by the trial court in favor of workers as to "primary duty" with respect to employees *making less then $250 per week.*

Respondents suggest that the First (sic) Circuit's decision in *Donovan v. Burger King Co.*, 675 F.2d 516 (2nd Cir. 1982) is such a case. But it is not. In *Burger King*, the Second Circuit left standing judgments in favor of employees earning less than $250 per week.[3]

Petitioners also stated in their Petition that they were even more confident that there have been no reported decisions in which a Court of Appeals has set aside *five* separate findings of fact, letting stand findings of fact conflicting with the new findings by the Court of Appeals. The Petitioners then pointed out that any *one* of these findings erroneously set aside would justify the judgment of the trial court.

Instead, Respondents claim the *sole basis* for petitioner's position is nullified by *Burger King, supra.* Had

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[3] If Respondents were correct then that Circuit would be in conflict with *Dahlheim, supra,* and *Norman's Country Market, supra.*

Respondents "bothered to read" (the words of Respondents) Question Presented for Review No. 3 and the text of this section of the Petition, Respondents would have discovered the omitted language of the Petition pointed out above. They would have further discovered from the Question Presented itself that Petitioners also relied on the fact that "the Court of Appeals ignored previous controlling decisions of this Court in other FLSA cases" and "substitutes its judgment for that of the trial court on *five* separate findings of fact when any one of the trial courts' findings of fact would support the judgment of the trial court." And had they read the Question they would have discerned that the "sole basis" for Petitioners was not as stated at page 16 of the Respondent's Brief. There was and is much more.

It is also noteworthy that Respondents concede at page 16 of their Brief that "FLSA cases are peculiar because they are always dependent on individual *fact* situations." (emphasis supplied) To contend that the Court of Appeals decided only legal issues and did not substitute its judgment of facts for that of the trial court seems preposterous.

Ironically, although Respondents concede that FLSA cases are always dependent on individual fact situations, they cite two district court cases, *Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874, 99 Lab. Cas. (CCH) ¶ 34,457 (N.D. Ga. 1983) and *Marshall v. Sally Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672,673, 94 Lab. Cas. (CCH) ¶ 34,207 (E.D. La. 1982), with entirely different facts, on page 11 of their Brief. In *Waffle House*, the alleged managers were paid substantially more on an hourly basis than the hourly employees. In *Sally Beauty*,

the parties *stipulated* that the employee was "in sole charge."

CONCLUSION

For the reasons stated in our Petition and in this Reply Brief, we respectfully submit our Petition for Writ of Certiorari should be granted, and that pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, this Court should set aside the opinions of the Court of Appeals in *Murray I* and *Murray II*, reinstate all five findings of fact of the trial court, and that the matter should be remanded to the trial court for recomputation of damages to be awarded to Russell Renecker.

DATED at Sioux City, Iowa, August 25, 1995,

Respectfully submitted,

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